Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

80-1667

No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

JOHN R. MANSON,
Petitioner

v.

MAXIMINO VILLAFANE
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

ROBERT E. BEACH, JR.
Assistant State's Attorney
Office of the Chief
State's Attorney
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

QUESTIONS PRESENTED FOR REVIEW

A. Even if grand juries were selected improperly, is the remedy of vacating a murder conviction appropriate where the composition of the petit jury is not challenged and where, in the intervening years between the criminal defendant's indictment and the federal habeas corpus action, the grand jury selection process has been reformed?

B. Is a prima facie case of substantial underrepresentation of Hispanics on grand juries established where, over a nine year period of time, the average percentage of Hispanics on the voter lists was approximately 0.9% and the percentage of Hispanics on grand juries was approximately 0.3%.

C. Did the Second Circuit Court of Appeals err in finding discriminatory purpose in selection of grand juries compel reversal of a conviction where there is no substantial underrepresentation?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

A. IS REVERSAL OF A CONVICTION REQUIRED WHEN THE GRAND JURY SELECTION PROCESS HAS BEEN REFORMED 7

B. A PRIMA FACIE CASE OF SUBSTANTIAL UNDERREPRESENTATION WAS NOT ESTABLISHED 8

C. IN THE ABSENCE OF A FINDING OF SUBSTANTIAL UNDERREPRESENTATION, MAY A CONVICTION BE REVERSED ON A FINDING OF DISCRIMINATORY PURPOSE 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Avery v. Georgia, 345 U.S. 559 (1953) 9

Cassell v. Texas, 339 U.S. 282 (1950) 9

Castaneda v. Partida, 430 U.S. 482 (1977) 8

Rose v. Mitchell, 443 U.S. 545 (1979) 7

State v. Villafane, 164 Conn. 637 (1973) 4

Swain v. Alabama, 380 U.S. 202 (1965) 8

United States v. Maskeney, 609 F.2d 183 (5th Cir. 1980) 9

Washington v. Davis, 426 U.S. 229 (1976) 9

OPINIONS BELOW

The opinion of the trial court, the Superior Court, is not reported. The Supreme Court of Connecticut opinion appears at 164 Conn. 637, 325 A.2d 251 (1973); this opinion is confirmed at 171 Conn. 644, 372 A.2d 82 (1976). Certiorari was denied at 429 U.S. 1106, 97 S.Ct. 1137, 51 L.Ed.2d 558 (1977).

The opinion of the District Court for the District of Connecticut, Civil No. H-78-177 (July 7, 1980), has not been reported, nor has the brief affirmance of the United States Court of Appeals for the Second Circuit, No. 80-2215 (November 6, 1980).

JURISDICTIONAL GROUNDS

The action was brought by the respondent Maximino Villafane, pursuant to 28 U.S.C. §2254, in the United States District Court for the District of Connecticut. The petitioner, Commissioner of Corrections of the State of Connecticut, appealed to the United States Court of Appeals for the Second Circuit, which affirmed the District Court's order on November 6, 1980. A motion for a rehearing was denied by the Court of Appeals on February 18, 1981. It is believed that this Court's jurisdiction to review the judgment by writ of certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "[N]or (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

Section 54-45 of the Connecticut General Statutes provides in part:

> "The superior court may, when necessary, order a grand jury of eighteen electors of the judicial district where said court is sitting to be summoned, impaneled and sworn to inquire after and present such offenses as are cognizable by said court.....No person shall be put to plea or held to trial for any crime the punishment of which may be death or imprisonment for life unless an indictment has been found against him for such crime by a grand jury legally impanelled and sworn...."

STATEMENT OF THE CASE

Villafane was indicted for the crime of felony murder on December 6, 1971, by a grand jury convened in Fairfield County, Connecticut. (App. 3A). Prior to trial, he moved to quash the indictment; the motion was granted by the trial court, which held essentially that the results of the selection process were inconsistent with random selection. (App. 21A-22A). Its findings of fact have been to a large extent relied upon throughout the course of the litigation.

The state appealed to the Connecticut Supreme Court, which reversed the Superior Court and reinstated the indictment. Recognizing that "[p]urposeful discrimination exists whenever significant unexplained disparities exist alongside an opportunity to discriminate," the Connecticut Supreme Court found that the statistics used by the Superior Court overrepresented the percentage of Puerto Ricans in the electoral pool and that court's conclusion of significant underrepresentation of Puerto Ricans serving on grand juries could not be sustained. See *State v. Villafane,* 164 Conn. 637, 647, 649-51, 325 A.2d 251 (1973).

Villafane was tried and convicted of murder in the first degree and his conviction was confirmed by the Connecticut Supreme Court. *State v. Villafane,* 171 Conn. 644 (1976). No claim has been made that Puerto Ricans were systematically excluded from the jury which convicted him.

After certiorari was denied by this Court; 429 U.S. 1106, 97 S.Ct. 1137, 51 L.Ed.2d 558 (1977); Villafane filed an action in the District Court for the District of Connecticut pursuant to 28 U.S.C. §2254, which alleged, inter alia, a violation of the Equal Protection Clause of the Fourteenth Amendment in that Puerto Ricans were systematically excluded from grand juries in Fairfield County. The District Court, Blumenfeld,J., granted relief; if concluded, through an application statistical

decision theory, that where Puerto Ricans constituted over a nine year period of time .93% of the eligible grand jury pool, and approximately 0.3% of the grand jurors selected were Puerto Rican, the actual result ws inconsistent with random selection and a prima facie case was established by the "rule of exclusion." The District Court went on to hold that the prima facie case not not rebutted by a showing of the voluntary nature of grand jury selection; finally, it rejected a contention that *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), does not foreclose a finding of harmless error because the selection process has long since been reformed. (App. 27A et seq.)

The State of Connecticut appealed to the United States Court of Appeals for the Second Circuit, which affirmed the order of the District Court but which used a totally different rationale. It held that the selection process was not racially neutral, that there was a failure on the part of the sheriff who picked grand jurors to be informed of eligible Hispanic grand jurors, and that there were no Hispanics on the grand jury which indicted Villafane, (App. 1A). A petition for rehearing in banc, which alleged inter alia that there was no factual basis for the Second Circuit's conclusion and that absent a showing of actual substantial underrepresentation, the *Cassell v. Texas,* 339 U.S. 282 (1950), reasoning is inapposite, was denied. (App. 2A).

The underlying facts are relatively simple. Villafane was indicted in 1971. During the nine year period from 1963-1971, 738 selections were made for service on grand juries in Fairfield County. The selections were made from a list of 138 names which was kept by the Sheriff of Fairfield County, who at the time was John Previdi. (App. 4A-5A). The list included people with different occupations and ages. He inherited the list from his predecessor in 1963; during the period of time from 1963-1971, the list was altered by about 25 names. The sheriff personally chose the replacements. (App. 4A-5A).

In the course of making his selections, Sheriff Previdi tried to obtain more Puerto Ricans; he requested the assistance of a registrar of voters, A. Edward Sandula, in this effort. Sandula suggested Russell Colon, a Puerto Rican, who served on a grand jury in 1970. Colon sat on two cases on May 11, 1970. He attempted to request his service again but was unable to locate him. (App. 4A,10A-11A). Manuel Garcia, a Puerto Rican, served as a grand juror once in 1966; the sheriff tried to recall him on "several" occasions but Garcia refused to serve again. (App. 13A). If two of the 738 selections were Hispanic, the proportion would be about 0.3%.

A study conducted by Villafane's defense attempted to ascertain the proportion of Spanish surnames on voting lists in Fairfield County from 1963-1971. While the methods used were perhaps somewhat imprecise, the figure accepted as the average from 1963 to 1971 was 0.93%. *Villafane* I, (App. 5A).

A statistician determined that the chances that two or fewer Hispanics could have been chosen through a random selective process was 3.28%. As that probability was less than 5%, the hypothesis of random selection was rejected. (App. 36A-46A).

The Court had before it an affidavit of C. Young Becker, a Deputy Sheriff, to the effect that the system for selecting grand jurors has been reformed. Now, the sheriff picks the names of grand jurors at random from a pool of those available for regular jury service. (121A) The latter jurors are selected according to an elaborate system outlined in §§51-217 et seq. of the Connecticut General Statutes; the validity of this selection process has not been attacked by Villafane. The court, nevertheless, granted relief. (App. 39A-40A).

REASONS FOR GRANTING A WRIT OF CERTIORARI

A. EVEN IF GRAND JURORS ARE IMPROPERLY SELECTED, DOES *ROSE V. MITCHELL*, 443 U.S. 545 (1979) REQUIRE REVERSAL WHEN THE SELECTION PROCESS HAS BEEN REFORMED?

As noted above, the District Court found substantial underrepresentation of Hispanics on grand juries from 1963-1971 and granted relief; the Second Circuit affirmed on somewhat different grounds. In both counts, the state of Connecticut claimed that any error was harmless, as the selection system had, between the times of the indictment and the federal action, been changed. The District Court rejected the claim and the Second Circuit didn't appear to consider it.

By a narrow margin, this Court rejected a similar claim in *Rose v. Mitchell*, supra. While this Court recognized that significant costs attend the reversal of a conviction because of a defect in the selection of a body which determines only probable cause, five Justices held that the costs were outweighed by the policy of the Court of combatting discrimination and that alternative remedies, such as federal prosecutions and civil actions, were not sufficiently effective.

Here, a different situation was presented. The District Court accepted, at least for purposes of argument, that the selection of grand jurors in Fairfield County was now performed randomly, but held that *Rose* foreclosed relief. But here, there are no remaining rights of society to be vindicated; the indictment in question was handed up almost ten years ago and the system has been changed. Villafane has suffered no prejudice: it is well established that no one has a right to a particular cross-section on his "own" grand jury and no claim has

been made as to the petit jury which convicted Villafane of murder in the first degree.

It is urged that the question presents an important question of federal constitutional law not yet decided by this Court and review by this Court is appropriate.

B. A PRIMA FACIE CASE OF SUBSTANTIAL UNDERREPRESENTATION WAS NOT ESTABLISHED.

The District Court applied statistical decision theory to the findings of fact, derived primarily from state court proceedings. The facts relied upon by the District Court were that during 1963-1971, 738 selections were made from a "pool" whose Hispanic contingent constituted 0.93%. Two, or about 0.3%, of the selections were Hispanic.[1] A statistician computed that the chances of this result occurring under a random selection process was 3.28%; as this figure was less when two standard deviations, i.e., 5%, the hypothesis of randomness was rejected and systematic exclusion was inferred. One judge on the panel of the Court of Appeals would have affirmed on the basis of this analysis.

It is submitted that this Court has never considered such a slight underrepresentation to be "substantial." In *Swain v. Alabama*, 380 U.S. 202 (1965), for example, blacks represented 26% of the population and 10-15% of jury panels. This Court found the underrepresentation not to be substantial. By contrast, in *Castaneda v. Partida*, 430 U.S. 482, 492 (1977), the Court found an underrepresentation of 40%. The chances of this result were, depending on the sample used, either one in 10^{140} or one in 10^{25}. The contrast to the present case is striking. It is submitted that a gross deviation of 0.6%, where there is not total exclusion, can hardly constitute substantial underrepresentation.

---

[1] Whether the findings necessarily support these statistical "conclusions" has been contested by the petitioner. For purposes of this argument, however, they are accepted.

Further, at least one Circuit has rejected the use of statistical decision theory altogether. In *United States v. Maskeney*, 609 F.2d 183, 190 (5th Cir. 1980), the Fifth Circuit noted that this Court has always relied upon absolute disparities in its holdings.

It is submitted that the holding in this case is contrary to the opinions of this Court and to that of at least one other Circuit, and certiorari should be granted.

C. MAY A FINDING OF DISCRIMINATORY PURPOSE IN THE SELECTION OF GRAND JURORS VITIATE A CONVICTION IN THE ABSENCE OF SUBSTANTIAL UNDER-REPRESENTATION?

The Second Circuit affirmed the opinion of the District Court by mentioning that the selection process was not neutral, there was a failure on the part of the sheriff to be informed of eligible Hispanics, and no Hispanics were on the grand jury which indicated Villafane. The Court of Appeals relied upon *Washington v. Davis*, 426 U.S. 229 (1976); *Avery v. Georgie*, 345 U.S. 559 (1953); and *Cassell v. Texas*, 339 U.S. 282 (1950).

First, it is submitted that the "fact" that the sheriff failed to be informed of eligible Hispanics has no support in the record: in fact, he enlisted aid in finding more Hispanics. (App. 10A). More importantly, however, the Court of Appeals never considered whether there existed substantial underrepresentation in the first place.

The reference to *Washington v. Davis*, supra, was misleading in that in that case the "test" was dicta and, crucially, a racially disproportionate impact had been shown and the issue was discriminatory intent. In *Avery v. Georgia*, supra, a fairly obvious color-coding system was used for jury selection and, though over 5%

of those in the "pool" were black, no blacks were selected for a panel of 60 prospective jurors. The rationale for a showing of a prima facie case was that although many were available, not a single black was picked; blacks constituted 25% of the population and 14% of the tax receiver's digest. Similarly, in *Cassell v. Texas,* supra, there were a large number of eligible blacks, none were selected, and apparently no efforts were made to find blacks to serve.

Recent cases have required a showing of substantial underrepresentation before the question of intent is addressed:

> [I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied....Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time....
>
> [A] selection procedure that is susceptible of of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing....Once the defendant has shown substantial underrepresentation of his group, he has made out a case at discriminatory purpose....

Castaneda v. Partida, supra, at 494-95.

See also *Rose v. Mitchell,* supra, at 3008-09.

It is submitted that in the absence of a showing of substantial underrepresentation, a prima facie case cannot be established, and that the Court of Appeals decided the case contrary to the opinions of this Court.

CONCLUSION

The petitioner urges that certiorari be granted in this case. The underrepresentation of Hispanics was minor. As the issue has nothing to do with the determination of guilt or innocence and the system has been changed, no useful purpose is served by the reversal of a conviction.

JOHN R. MANSON

By_____

ROBERT E. BEACH, JR.
Assistant State's Attorney
Office of the Chief State's Attorney
P.O. Box 5000, Wallingford, CT 06492
(203) 265-2373

No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

JOHN R. MANSON,
Petitioner

v.

MAXIMINO VILLAFANE
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

ROBERT E. BEACH, JR.
Assistant State's Attorney
Office of the Chief
State's Attorney
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

TABLE OF CONTENTS - APPENDIX

Page

1. Opinion of Second Circuit..... 1A

2. Denial of Motion for Rehearing 2A

3. Portion of the Opinion of the Connecticut Supreme Court..... 3A

4. Findings of Fact - Superior Court..... 9A

5. Portions of District Court Opinion 27A

6. Footnotes..... 41A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT - OPINION

MAXIMINO VILLAFANE,
Petitioner-Appellee

against 80-2215

JOHN R. MANSON,
Respondent-Appellant

Appeal from the United States District Court for the District of Connecticut.

There is no dispute that the selection procedure was not racially neutral; that there was a failure on the part of the Sheriff to be informed of eligible Hispanic grand jurors in Fairfield County; or that there were no Hispanics on the grand jury which indicted the petitioner. These factors raise the presumption of discrimination which was not rebutted by the respondent. *Washington v. Davis,* 426 U.S. 229, 241 (1976); *Avery v. Georgia,* 345 U.S. 559 (1953); *Cassell v. Texas,* 339 U.S. 282 (1950).

The order is affirmed.

Judge Oakes concurs and would also affirm on Judge Blumenfeld's opinion below (Civil No. H-78-117, D.Conn. July 7, 1980).

William H. Mulligan

James L. Oakes,
Circuit Judge

Charles M. Metzner
District Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of February, one thousand nine hundred and eighty-one.

MAXIMINO VILLAFANE,
Petitioner-Appellee,

No. 2215

v.

JOHN R. MANSON, Commissioner of Corrections,
Respondent-Appellant,

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent-appellant, John R. Manson,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

STATE OF CONNECTICUT
v.
MAXIMINO VILLAFANE

Argued February 7 - decided May 2, 1973

Indictment charging the defendant with the crime of murder in the first degree, brought to the Superior Court in Fairfield County; the defendant's plea in abatement and motion to quash sustained, *Saden, J.*, and, on permission being granted, the state appealed to this court. *Error; further proceedings.*

Donald A. Browne, assistant state's attorney, with whom, on the brief, was *Joseph T. Gormley, Jr.,* state's attorney, for the appellant (state).

L. Scott Melville, for the appellee (defendant).

LOISELLE, J. The defendant was indicted for the crime of first-degree murder by an eighteen-member grand jury on December 6, 1971. On December 10, 1971, the defendant entered a plea of not guilty to the murder indictment and on February 29, 1972, filed in one pleading a combined plea in abatement and motion to quash. The defendant's primary claim in the plea in abatement and motion to quash was that the grand jury which indicted him was illegally impaneled, in that a systematic exclusion of persons of the same racial, ancestral or cultural background as that of the defendant, who is of Puerto Rican parentage, was practiced in the selection of the grand jury.

Following a hearing on the pleadings, the court sustained the defendant's plea in abatement and motion to quash. In accordance with General Statutes §54-96 the court granted the state permission to appeal. The state has assigned error in several of the court's conclusions.

The trial court's conclusions are tested by the finding.[1] *Sea Beach Assn. v. Water Resources Commission*, 164 Conn. 90, 318 A.2d 115; *Brauer v. Freccia*, 159 Conn. 289, 293, 268 A.2d 645.

The finding reveals the following facts which are relevant to the claims pressed by the state. During the nine years from 1963 to 1972, John P. Previdi, as sheriff of Fairfield County, selected individuals to serve on grand juries. Sheriff Previdi maintains a list or panel of individuals who are residents of all the towns in Fairfield County with the exception of the communities of New Fairfield, Sherman, Redding and Wilton. This panel of potential grand jurors includes individuals with different occupations and with a wide range of ages. The list has been altered by approximately twenty-five names during the previous nine years for a variety of reasons. Sheriff Previdi's selections for the various grand juries during the period from 1963 through 1971 were restricted to the list of 138 names maintained in his office. The list was composed largely of friends and acquaintances of the sheriff. In an attempt to obtain more Puerto Rican individuals for his panel of potential grand jurors, Sheriff Previdi requested the assistance of the registrar of

---

[1] The state assigns error in the finding and specifically attacks the court's failure to find material facts as set forth in twenty-seven paragraphs of the draft finding. Seven of these paragraphs, which the state seeks to include in the finding, were in fact found or were implicit in the finding. A finding need not be in language identical with the draft finding. *Walsh v. Turlick*, 164 Conn. 75, 316 A.2d 759. Of the remaining paragraphs, eight were not mentioned in the state's brief or appendix. To secure an addition to the finding the state must point to some part of the appendix, the pleading or an exhibit properly before us which discloses that the defendant admitted the truth of the fact or that its validity was conceded to be undisputed. *Gordon v. Indusco Management Corporation*, 164 Conn. 262, 320 A.2d 811; *Gary Excavating, Inc. v. North Haven*, 164 Conn. 119, 318 A.2d 84. A fact is not admitted or undisputed merely because it has not been contradicted. *Malarney v. Peterson*, 159 Conn. 342, 344, 269 A.2d 274. While there is evidence in the appendix to the state's brief to establish that the court heard testimony supporting the remaining requested additions, these paragraphs were in dispute. The state has failed to show that facts were admitted or undisputed and, therefore, no additions to the finding are warranted.

voters in Bridgeport, A. Edward Sandula. To determine whether Puerto Rican individuals were systematically excluded from grand jury participation, the defendant recruited a committee headed by Kathleen Earley to conduct a survey. This committee, which included three persons who had received training in the Spanish language, counted the number of Spanish-sounding surnames appearing on voting lists for the years 1963, 1966, 1969, 1970 and 1971 for Bridgeport, Norwalk, Stratford, Danbury, Fairfield, Stamford and Trumbull. The committee could ascertain only if a name generally appeared to be of Spanish origin and would count as Spanish-surnamed anyone with a name of Hispanic origin. It was assumed that no Spanish-surnamed electors lived in the remaining towns in the county. The results of the seven-town survey indicated that in 1971 approximately 1.35 percent of the total of 373,575 electors in Fairfield County were Spanish-surnamed. The survey showed that in 1970 1.11 percent of the electors were Spanish-surnamed. The percentage of Spanish-surnamed electors in the county for the following years was not computed, but a simple analysis of the raw data in the finding reveals that in 1969 .9 percent, in 1966 .8 percent and in 1963 .5 percent of the population were Spanish-surnamed. The nine-year average is therefore approximately .93 percent.

A publication of the greater Bridgeport regional planning agency dated August, 1971, shows Spanish-speaking persons as one of three racial categories considered, and certain sections of Bridgeport and Danbury are predominently Puerto Rican in character. The court found further that a total of 738 selections for grand jury service were made during the nine-year period between 1963 and 1971 and that only two persons of the 738 selected were Puerto Rican. After analyzing the data of the defendant's exhibit, and the testimony of an expert witness, the court found that based on established statistical methods the chance of selecting only two Spanish-surnamed electors out of 738 selections was 2000 to 1, and that such a result was not consistent

with a random selection. In addition, the court found that the selection of one Spanish-surnamed grand juror over the period 1969-71 was not consistent with a random selection of grand juries and, similarly, the selection of no Spanish-surnamed grand jurors in 1971 was not a result of a random selection. In determining the existence or nonexistence of randomness in the selection process, the percentage of Spanish-surnamed electors in the seven towns surveyed was an essential factor. The contents of the defendant's exhibits, made part of the findings, show that a nine-year average of 1.6 percent was employed by the defendant's expert in arriving at her conclusions which were accepted in the finding.

While the finding is more extensive than the brief narrative presented here, the foregoing statement is sufficient to review the conclusions attacked by the state.

* * *

In any event, the critical starting point for the analysis is a determination of what percentage of the total eligible electors are members of the class. In the finding, the court found that the percentage of Spanish-surnamed electors for the entire nine-year period was an essential factor for determining whether randomness existed. This figure taken from the corrected finding appears to be .93 percent, or less than 1 percent.[4] The defendant's exhibit, relied on by the expert witness, uses the figure of 1.6 percent for the Puerto Rican population in determining that the selection was not at random. To resolve this conflict in the finding we have examined the transcript. The transcript reveals that the defense statistician used the base percentage of 1.6 percent in all calculations. This nine-year average figure is greater than the largest percentage, 1.35 percent, found for any year in the finding. The 1.6 percent figure

[4] This .93 percent figure is the average of the percentages for the five years tabulated.

was obtained by the defendant's statistician, who determined the percentage of Spanish surnames by weighing the percent of Spanish surnames from each of the towns by the respective percentage of grand jurors selected from those towns. The total figure of 1.6 percent is thus a weighted average which was explained as the percentage of Spanish-surnamed individuals in a town multiplied by the likelihood of a grand juror coming from that town. This likelihood of selection was based on the frequency of actual selections from that town over the nine-year period.

While it is clear that statistical proofs are valuable tools for the court in evaluating claims of discrimination, the use of such analysis must be restricted to a showing of results which might have been expected from mere chance. To determine this expected result the court must insist that the data offered comprise theoretical results. Although weighted averages are frequently utilized by statisticians, the court must determine results expected by random chance assuming an equiprobable selection process in which, under conditions of true randomness, all citizen electors of all towns had an equal chance to be selected for grand jury service. In this manner the court will have as a touchstone an expected result from random selection and can then test the actual observed results by this theoretically random result.

The defendant here made no claim that discrimination resulted from overrepresentation of some parts of the county at the expense of others and therefore the use of weighted averages based on the historical frequency of selection from certain towns in the county was inappropriate. Since the court's ultimate conclusion that the defendant had established a prima facie case was based on these impermissible statistical proofs and since the average of 1.6 percent used in the calculations cannot be supported by the finding which indicates the greatest percentage of Spanish-surnamed electors in the county at any time was 1.35 percent, we must hold that the court erred in quashing the indictment and concluding that Spanish-surnamed persons were not exposed to

a fair chance of selection for grand jury service. We recognize that this case was complicated by the difficulty in gathering statistical data and in interpreting the statistical theories presented by the defendant, but we are constrained to hold that a grand jury selection method may not be declared unconstitutional in the absence of even a prima facie case of discrimination. The defendant's offer in this case overestimated the percentage of Spanish-surnamed electors and thus rendered any conclusion based on it erroneous. It is inappropriate to speculate on the results which might have been found from an evaluation of the data assuming equiprobable selection of citizens regardless of residence and a nine-year average of .93 percent Spanish-surnamed electors, or any other shorter time span with a verified percentage of Spanish-surnamed electors. Such issues would require a full exploration at the trial level.

It is unnecessary to review the state's claim that the court erred in concluding that the state failed to rebut the prima facie case of systematic exclusion. It should be noted, however, that mere protestations of good faith are not sufficient to rebut a prima facie case. *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536.

There is error; the plea in abatement and motion to quash were erroneously sustained. The indictment is therefore reinstated.

In this opinion the other judges concurred.

SUPERIOR COURT STATE OF CONNECTICUT
FINDING

First: The following facts are found:

1. One John P. Previdi has been the elected sheriff of Fairfield County for the period from 1963 through 1972.

2. During the nine years that he has served as sheriff of Fairfield County, John P. Previdi has selected the individuals who have served upon the grand juries convened during that period.

3. During the period between 1963 and 1971, a total of 41 grand juries were convened by order of the Superior Court for Fairfield County.

4. Sheriff Previdi maintains a list or panel of individuals from which he selects each grand jury.

5. Sheriff Previdi keeps records of the names of the individuals selected to serve as grand jurors.

6. In the selection of persons to serve as grand jurors, Sheriff Previdi does not give any consideration to a person's political persuasion.

7. In his selection of grand jurors, Sheriff Previdi said he attempted to obtain a cross-section of the community.

8. Sheriff Previdi obtained a list or panel of grand jurors from his precedessor when he became sheriff in 1963.

9. During the past nine years, Sheriff Previdi's list from which he selected grand jurors has changed to the extent of approximately 25 names being dropped for a variety of reasons and an equivalent number added through his personal choice.

10. Sheriff Previdi's list of grand jurors includes residents of all of the towns and cities within Fairfield County with the exception of the towns of New Fairfield, Sherman, Redding, and Wilton.

11. Sheriff Previdi has tried unsuccessfully to obtain grand jurors from the towns of New Fairfield, Sherman, Redding, and Wilton.

12. In his selection of individuals to compose a panel for grand jury selection, Sheriff Previdi in his own way attempts to obtain persons from different areas of the County.

13. The panel of potential grand jurors selected by Sheriff Previdi includes individuals with different occupations and with a wide differential in ages so as to include relatively young, middle aged, and older people.

14. In 1970 Sheriff Previdi selected an individual by the name of Russell Colon to serve on his panel of grand jurors.

15. The grand juror Russell Colon was of Puerto Rican extraction.

126. Russell Colon subsequently served as a grand juror on May 11, 1970, in two separate cases entitled the State of Connecticut vs. Angel Vasquez and the State of Connecticut vs. Gregoria Vargas.

17. In an attempt to obtain more Puerto Ricans for his panel of grand jurors, Sheriff Previdi requested assistance from one A. Edward Sandula, Republican Registrar of Voters in the City of Bridgeport.

18. At the time that he requested the assitance of Mr. Sandula, Sheriff Previdi knew that there were Puerto Ricans living in Bridgeport.

19. Registrar of Voters A. Edward Sandula suggested the name of Russell Colon as a prospective grand

juror and Colon subsequently served as a grand juror on May 11, 1970.

20. Since May 11, 1970, Sheriff Previdi has attempted to locate Russell Colon for additional service as a grand juror but has been unable to locate him.

21. During the years between 1963 and 1971, 738 different individuals served as grand jurors in Fairfield County.

22. During the years between 1963 and 1971 at least one attorney served on each grand jury impaneled within Fairfield County.

23. During the years between 1963 and 1971, 105 individuals served on more than one grand jury in Fairfield County.

24. During the years between 1963 and 1971, 33 persons served on only one grand jury in Fairfield County.

25. During the years between 1963 and 1971, 18 individuals served twice on the grand jury in Fairfield County.

26. During the years between 1963 and 1971, 22 individuals served on more than 10 grand juries in Fairfield County.

27. During the years 1970 and 1971 in Fairfield County a total of ten 18-member grand juries were convened during each year.

28. In 1972 Kathleen Earley, also known as Sister Kathleen Earley, was recruited by the defendant's attorney to conduct a survey of voting lists in Fairfield County to count the number of Spanish-sounding surnames.

29. Kathleen Earley organized a team or committee of eight members which attempted to count the number

of Spanish-sounding surnames appearing in the voting lists for the years 1963, 1966, 1969, 1970 and 1971 for the communities of Bridgeport, Norwalk, Stratford, Danbury, Fairfield, Stamford, and Trumbull.

30. Kathleen Earley did not question any of her committee members about their knowledge of Spanish or Spanish-sounding names before the committee began its investigation.

31. Kathleen Earley knew that three other members of her committee or team had training in the Spanish language.

32. In its investigation of community voting lists, Kathleen Earley's committee did not differentiate between Puerto Rican and other Spanish-sounding names.

33. Kathleen Earley and her committee could ascertain only if a name generally appeared to be of some type of Spanish origin.

34. Kathleen Earley and her committee would count as a Spanish-sounding named elector anyone with a name of Hispanic origin.

35. The members of Kathleen Earley's committee found that their examination of the voting records of the seven cities and towns indicated at total of 1784 electors with Spanish-sounding surnames for the year 1963; 2621 such electors for the year 1966; 3278 such electors for the year 1969; 4058 such electors for the year 1970; and 5059 such electors for the year 1971.

36. Voting records for Fairfield County show that there were 326,773 registered voters within the County in 1963; 344,528 such voters in 1966; 367,492 such voters in 1969; 365,199 such voters in 1970; and 373,575 such voters in 1971.

37. One Douglas Bora served as a grand juror on five occasions between 1963 and 1971.

38. One Ferdinand Equi served as a grand juror on seven occaions between 1963 and 1971.

39. One Manual Garcia served as a grand juror once in 1966.

40. Sheriff John P. Previdi attempted to recall Manual Garcia as a grand juror several times but Mr. Garcia refused to serve again.

41. The defendant was indicted for first-degree murder by an 18-member grand jury on December 6, 1971.

42. On December 10, 1971, the defendant, while represented by competent counsel in the person of the public defender, entered a plea of not guilty to the murder indictment and the matter was assigned for trial on January 25, 1972; on December 6, 1971, the defendant through the public defender filed a motion for discovery, a motion for bill of particulars, and a motion for bond; and on December 23, 1972, the State filed its written disclosure and bill of particulars.

43. On January 27, 1972, the public defender withdrew as counsel for the defendant and present counsel appeared on behalf of the defendant and the case was continued to March 1, 1972, for trial.

44. On February 29, 1972, the defendant filed his combined plea in abatement and motion to quash in one pleading.

45. Population estimates of the State Health Department in 1969 for Fairfield County indicated a Spanish-speaking group of approximately 33,000 persons out of a total population of 787,000, or approximately 4% Spanish-speaking.

46. A publication of the Greater Bridgeport Regional Planning Agency dated August, 1971, containing a table and charts showing population changes by race for the

City of Bridgeport for the years 1950, 1960 and 1970, shows Spanish-speaking persons as one of three racial categories of population considered.

47. Certain sections of Bridgeport and Danbury, respectively, as well as other cities and towns throughout the County, are predominantly Puerto Rican in character and are inhabited by persons of Puerto Rican extraction.

48. According to an analysis of Exhibit 7, 250 of the 738 grand jurors chosen, or approximately 35% of the grand jurors chosen in Fairfield County over the nine-year period between 1963 and 1971, came from the City of Bridgeport.

49. Sheriff Previdi's selections for the various grand juries over the period from 1963 through 1971, in fact, were restricted to a list of some 138 names recorded on index cards and maintained in his office.

50. The Sheriff only resorted to outside sources when persons on the smaller list either died, moved out of the jurisdiction, or otherwise made themselves permanently unavailable.

51. This list of 138 names was composed largely of friends and acquaintances personally known to the sheriff, including some who were golfing partners of his, and friends and acquaintances of the sheriff's friends.

52. Of the people whose names were on the list, one person served on grand juries as many as 20 times during the nine-year period Sheriff Previdi was in office; and in one year that person served on six out of the eight grand juries that were selected.

53. Another individual served as many as 14 times during the nine-year period, serving on as many as five grand juries in the year 1971.

54. All told, 22 out of the 138 people on the Sheriff's list have served between 11 and 20 times during the nine-year span; 50 people have served between four and ten times; 33 people have served between two and three times, and only 33 out of a total of 138 people have served but once.

55. An analysis of the data contained in Exhibit 7 indicates that the seven towns of Bridgeport, Fairfield, Trumbull, Stratford, Stamford, Danbury, and Norwalk accounted for 539 of the 738 selections to the grand jury, or approximately 74% of all the selections during the nine-year period of the Sheriff's tenure.

56. To his own knowledge, the Sheriff selected exactly two persons he believed to be Puerto Rican during his nine-year tenure in office.

57. No persons having Spanish surnames or of Puerto Rican extraction served on the defendant's grand jury.

58. One Emanuel Garcia served on a grand jury once in 1966 and one Russell Colon served on a grand jury once in 1970.

59. The Sheriff testified that it was his practice to select a person for grand jury service of the same ethnic background as that of the defendant where he knew the defendant's ethnic background.

60. The Sheriff considered the surname in determining whether or not the defendant was of Puerto Rican extraction.

61. The names of Garcia and Colon were still on the Sheriff's official list of 138 potential grand jurors as of April 6, 1972.

62. The Sheriff was well acquainted with the official voting lists and the voting districts in his own home town of Danbury.

63. The Sheriff also knew the areas of Danbury where a predominance of Puerto Ricans resided.

64. The Sheriff was further able to determine in what voting districts in his home town of Danbury there might be concentrations of Puerto Ricans.

65. The Sheriff never once consulted the voting lists in his home town in Danbury in an attempt to obtain Puerto Rican grand jurors.

66. In making his selections to the grand jury, the Sheriff made no independent examination of the potential jurors to determine if they were physically, mentally, or intellectually able to serve.

67. The Sheriff had no idea how many Puerto Rican electors there were in the County over the period of his tenure.

68. In his selection process, the Sheriff made no effort to determine the ethnic composition of the County.

69. In his selection process, the Sheriff made no effort to determine the religious composition of the County.

70. In his selection process, the Sheriff did not make himself aware of the shifts in population within the County.

71. The Sheriff did not know if there was a predominance of people of any particular race or ethnic background within Fairfield County.

72. In his selection process, the Sheriff never made any attempt to find out the areas where Puerto Ricans lived on a county-wide basis.

73. In his selection process, the Sheriff did not take into consideration the existence of any racial concentrations in Fairfield County.

74. In his selection process, the Sheriff has never gone personally to any Puerto Rican person to ask him to serve on the grand jury.

75. The Sheriff acknowledged that he does not personally know any one who is Puerto Rican who he could ask to be a grand juror.

76. In selecting persons of Puerto Rican extraction to his panel, the Sheriff relied solely on recommendations from others and not upon his personal knowledge, investigations, or examinations of the individuals.

77. Kathleen Earley and a team composed of seven other persons conducted a survey of the number of Spanish surnames on the official registry lists for the years 1971, 1970, 1969, 1966, and 1963 in the towns of Bridgeport, Fairfield, Trumbull, Stamford, Norwalk, Stratford and Danbury.

78. Kathleen Earley possesses a bachelor's and a master's degree in Spanish; has studied Portuguese at the Berlitz Language School in Stamford, Connecticut, and Rio de Janiero, Brazil; has taught Portuguese for approximately 14 years in Massachusetts, Connecticut, and Brazil; was a school administrator in Brazil; spent a summer in Spain studying at the University of Salamanca and touring the country; lived in Brazil for three years; done parish census work in Puerto Rico during one summer; worked in a Spanish-speaking poverty program in New Britain, Connecticut, during the summer of 1966, and taught Spanish in the adult education program in Norwalk, Connecticut, in 1970.

79. In addition to Kathleen Earley, the survey team consisted of Mrs. Marion Cardell, Mrs. Jane Igoe, Sister Mary Xavier, Sister Alice Carmen, and Virginia Howard. The members of the team came from various parts of the County.

80. At least three of the members of this team had degrees in Spanish and two others had some Spanish training sufficient to recognize names.

81. Due to the lack of time, the survey was restricted to the years 1963, 1966, 1969, 1970 and 1971, and to the seven towns of Bridgeport, Fairfield, Trumbull, Stratford, Danbury, Stamford and Norwalk.

82. Only surnames that were Spanish in appearance were counted. If there were any doubt as to the origin of the name, then the first name would be considered as well as the address of the person. If any doubt remained, the name was not counted even if it looked Spanish enough.

83. The survey team worked in groups of twos, threes, and sometimes as many as fours.

84. In conducting this survey, those who had no specialized training in Spanish worked with someone who possessed specialized language training.

85. In conducting the survey the procedure used was that one person would canvass the official voters' list and call out the name while another would count it, and upon completion would strike a total of all the Spanish-surnamed names counted for each of the towns in each of the particular years in question.

86. If a member of the team lacked specialized knowledge of Spanish, that person would only do the recording.

87. After the survey was completed, a summary of the results was prepared in writing.

88. Exhibit 2 accurately portrays the results of this survey.

89. On one occasion a particular voting district in Norwalk was done twice by two different groups and the

results when compared showed a difference of only two names out of a total count of 370.

90. Mrs. Elizabeth Curtis, the Democratic Registrar of Voters for the City of Bridgeport, was familiar with all ethnic groups in Bridgeport and the areas of the city where they were located.

91. Mrs. Elizabeth Curtis has been Democratic Registrar of Voters in the City of Bridgeport for the past four years and Deputy Registrar for 14 years prior to that.

92. Mrs. Elizabeth Curtis estimated that Puerto Rican electors comprised between 4½ to 5% of the total number of electors in the City of Bridgeport for the year 1971, and this is found as a fact.

93. The estimate of Mrs. Elizabeth Curtis was not based on a consideration of Spanish surnames but rather on a consideration of actual place of birth of Puerto Rican electors, which information is contained in the official voter-application records, and this is found as a fact.

94. Mrs. Elizabeth Curtis further estimated that in the ten-year period between 1962 and 1972 the number of Puerto Rican electors in the City of Bridgeport had doubled, and this is found as a fact.

95. Dr. William Frawley is an applied mathematician by profession and possesses a bachelor's, masters, and PhD degrees in mathematics; he has taught mathematics on the college level and is presently employed as the head of the mathematics section of a company which determines the location of oil deposits mathematically.

96. In both his present position and in his former position with NASA, Dr. William Frawley employed the Statistical Decision Theory and has taught it at the college level.

97. The Statistical Decision Theory is an important mathematical tool used by Dr. Frawley in his work.

98. The Statistical Decision Theory can be used to evaluate the results of the selection of Spanish-surnamed electors to grand juries.

99. In applying the Statistical Decision Theory to the selection of grand jurors, one takes three steps: First, one makes the assumption that the grand jury was selected randomly and computes what would be expected to happen in the choice of 738 grand jurors; secondly, one compares the actual or hypothetical results of Spanish-surnamed selections with the expected results of the random selections; and finally, one compares the difference between the two and forms an opinion as to the randomness of the selection in question.

100. Employing the Statistical Decision Theory, the selection of only two Spanish-surnamed electors to the grand jury in a nine-year period between 1963 and 1971 out of 738 selections was not consistent with a random selection.

101. Based upon established statistical methods, the odds or chances of selecting only two Spanish-surnamed electors out of 738 selections over the nine-year period between 1963 and 1971 to be 2000 to 1, or one chance in every 2000 selections.

102. In determining the existence or non-existence of randomness, the data contained in Exhibit 2 was used representing the number of Spanish-surnamed electors in each of the seven designated towns in the years 1963, 1966, 1969, 1970, and 1971; the number of electors in the County for the nine-year span as depicted in Exhibit 4, the frequency and number of grand jury selections from each of the various towns during the nine-year span as depicted in Exhibit 7.

103. In determining the existence or non-existence of randomness, it was assumed that there were no Spanish-surnamed electors in the remaining 16 towns in the County that were not listed in Exhibit 2.

104. The percentage of Spanish-surnamed electors in the seven towns for the entire nine-year period was an essential factor in determining whether randomness existed.

105. The survey of Spanish-surnamed electors as depicted in Exhibit 2 did not contain any data regarding the years 1964, 1965, 1967, and 1968.

106. The estimated number of Spanish-surnamed electors in the seven towns for the years 1964, 1965, 1967, and 1968 were determined by the use of a mathematical technique known as "Linear Interpolation" as shown on Exhibit 8 (top half).

107. The use of the technique of Linear Interpolation was mathematically proper and the estimates obtained would not significantly affect the results concerning the randomness or lack of it in the selection of grand jurors over the period in question.

108. For the years for which no data was available in this case, numerically calculated probabilities were used rather than subjective considerations.

109. The selection to the grand jury made during the year 1971 of zero Spanish-surnamed electors out of a total of 180 selections was not a result of random selection of grand jurors.

110. 1971 was the year in which the defendant's grand jury was selected.

111. Based upon established statistical methods, the odds of selecting zero Spanish-surnamed electors out of 180 selections in 1971 would be 50 to 1, or one chance in every 50 selections.

112. Over a three-year period between 1969 and 1971, a random selection of grand jurors normally would have produced eight Spanish-surnamed electors if the selections were at random. In fact, the Sheriff selected only one Spanish-surnamed grand juror during that period, and such a result was not consistent with a random selection of grand jurors.

113. Based upon established statistical methods, the odds of selecting only one Spanish-surnamed elector to the grand jury out of a total number of selections made during the period between 1969 and 1971 would be in the range of 3000 to 1, or one chance in every 3000 selections.

114. The State did not file any pleading to the "Combined Plea in Abatement and Motion to Quash the Indictment" dated February 29, 1972, but it nevertheless proceeded to a hearing on the merits, and the court, without objection from the parties, treated the case as though a general denial had been filed by the State.

115. This combined plea in abatement and motion to quash came to a hearing on April 4, 1972, at which time the State proceeded to trial of the issues of the defendant's Combined Plea.

116. The State at the beginning of the hearing for the first time indicated that it claimed the defendant's motion was not timely made and went on to say it did not intend to waive its claim in that respect but that it expected "to brief this point along with the other points that may be raised in connection with the merits of the motion itself."

117. At the conclusion of the hearing, the State filed a "Brief of the State in Opposition to Motion to Quash" dated April 24, 1972, in which it failed to brief the question of the defendant's failure to timely file its combined plea in abatement and motion to quash. Instead, the State confined its entire brief to the merits of the claim presented by the defendant's motion.

118. A radio station located in Bridgeport and operating on a 24-hour daily schedule caters exclusively in the Spanish language to Spanish-speaking people in the Fairfield County area.

Second: The following conclusions have been reached:

119. The evidence produced by the defendant established a prima facie case of systematic exclusion of a particular class or group in the selection of grand jurors in Fairfield County.

120. The grand jury which indicted the defendant was selected in an unconstitutional manner. The manner in which the grand jury array was selected in this case violates the equal protection clause of Article I, Sec. 20, of the Connecticut Constitution (1965) and the equal protection clause of the 14th Amendment to the United States Constitution.

121. The method of selecting a grand jury whereby a sheriff chooses the jury from a standing list of 138 names either inherited from his predecesor or chosen from among friends of the sheriff or friends of friends of the sheriff, clearly lends itself to invidious discrimination and is, therefore, unconstitutional.

122. The defendant is of Puerto Rican extraction.

123. Spanish-speaking people represent a distinct class in Fairfield County.

124. The method of selection used by the Sheriff did not expose Spanish-speaking people to a fair chance of selection on a grand jury in this case.

125. No Spanish-speaking person served on the grand jury in this case.

126. The method and manner of selection of grand jurors used by the High Sheriff failed to expose the

class of Spanish-speaking people in Fairfield County to a fair chance of selection for grand jury service in any case.

127. The High Sheriff maintained a relatively static small list (138) of prospective grand jurors, which was infrequently changed and consisted to a large extent of personal acquaintenances of the High Sheriff or of friends of friends of the High Sheriff. Such a list necessarily lent itself to invidious discrimination in this case in a constitutional sense against a Spanish-speaking defendant because such a list failed to expose the class of Spanish-speaking people who were electors in Fairfield County to possible selection for grand jury duty, notwithstanding the High Sheriff's good intentions over a period of nine years exemplified by his including two persons with Spanish-sounding surnames on his list of prospective grand jurors.

128. The State failed to present sufficient evidence to rebut the prima facie case of systematic exclusion of Spanish-speaking persons from grand jury service.

129. The use of Spanish surnames as a guideline in determining the number of Spanish-speaking electors in Fairfield County is a reasonably acceptable and reliable method of determining the number of such electors of a Spanish ethnic background eligible for grand jury duty.

130. The Court cannot determine whether the names of Douglas Bora, Amadeo Morrello and Ferdinand Equi were of Hispanic origin.

131. By failing to brief the question of timely filing of the defendant's combined motion after indicating to the court that it would do so, the State abandoned this technical objection to the defendants motion.

132. Even if this failure on the part of the State to pursue in its brief the question of lack of timely filing had not occurred, because this question is one of first impression in the State of Connecticut and involves a

matter of important public policy in the criminal law, the court is justified in going into the merits of the issues involved in this first case of its kind in Connecticut.

133. A random chance selection of grand jurors from voting lists of Fairfield County is a constitutionally acceptable method of selecting a grand jury which is available to the court or sheriff.

Third: The following occurred at the hearing of the defendant's combined motion and plea and the court thereafter ruled as indicated:

134. Before the introduction of evidence, the State addressed the court in the following manner:

> Mr. Browne: By way of preliminary statement, if your Honor please, before Mr. Melville commences his presentation, I would like to make two observations to your Honor.
>
> One, the State will expressly claim, if your Honor please, that this matter has not been timely filed, that this motion has not been timely filed; that if there was a motion to quash or to challenge the array of the Grand Jury, such a motion should have been filed prior to the testimony being presented to the Grand Jury and prior to the Grand Jury's deliberations.
>
> And, it is my position, if your Honor please that counsel has waited until the Grand Jury indicted his crime and that he could have attacked the Grand Jury prior to the hearing.
>
> He elected not to do that, taking the calculated risk that possibly they might not have indicted his client. His client could have walked free.

I want to expressly for the record make the claim at this time that this attack upon or challenge to the array of the Grand Jury is late, it is not timely, it should have been filed prior to the Jury hearing evidence and prior to the Jury's consideration of the matter.

And, again, I say that he calculated his strategy that possibly the Grand Jury might not have indicted his client. It did not work to his benefit, and I claim that the challenge to the array is too late.

I am not asking your Honor to make a decision on this particular point at this time. We will brief if and we will give your Honor some law.

The Court: I have no intention of making that decision right at this moment.

Mr. Browne: I just want to make the observation that by proceeding into the hearing, we don't intend to waive our claim —

The Court: I understand that.

Mr. Browne: I just want to make the observa- timely made. I expect to brief this point along with the other points that may be raised in connection with the merits of the motion itself.

I just wanted to make the observation before we get into the motion that that would be a claim of the State.

135. Thereafter, upon conclusion of the entire hearing on the merits, the State filed its brief on April 14, 1972, purportedly setting forth all of its claims of fact and law in which it completely omitted any mention of its claim of lack of timely filing by the defendant. In view of the State's action in this respect, the court treated this claim of lack of timely filing as abandoned by the State.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MAXIMINO VILLAFANE

v. Civil No. H-78-117

JOHN MANSON, COMMISSIONER OF CORRECTION, STATE OF CONNECTICUT

MEMORANDUM OF DECISION

I.

Petitioner was indicted for murder in the first degree on December 6, 1971 by an 18-member grand jury in Fairfield County. He was subsequently tried before a petit jury which returned a verdict of guilty. After exhausting his state remedies, petitioner filed this application for a writ of habeas corpus raising various constitutional claims.[1]

II.

Petitioner, a Puerto Rican, concentrates his efforts on a challenge to the array from which the indicting grand jury was selected. He claims that he has been denied equal protection of the laws on contravention of the fourteenth amendment by the systematic exclusion of Puerto Ricans from that array. In resolving his claim, it is useful to set forth those facts which are not in dispute.[2]

First, both parties agree that, at least prior to 1972, grand juries in Fairfield County were selected from the electorate by the County Sheriff. Sheriff John P. Previdi, County Sheriff at the time of petitioner's indictment, maintained a list of 138 persons from which he made his selections. His predecessor had maintained a

similar list. These lists were composed largely of the sheriffs' friends and acquaintances and their friends and acquaintances. In essence, both Sheriff Previdi and his predecessor had unfettered discretion in deciding on the membership of each grand jury.

Second, there is no dispute as to Sheriff Previdi's personal contact with Puerto Ricans. As the trial court found, he personally knew no Puerto Ricans whom he could ask to serve on the grand jury. He did not know the extent of the Puerto Rican electorate nor did he make any attempts to ascertain the neighborhoods in which the Puerto Ricans were concentrated. He was also unaware of the demographic shifts in Fairfield County during his tenure as sheriff.

Third, the parties do not dispute that Puerto Ricans constituted a small but identifiable class in the county.[3] Census figures identified the Puerto Rican population as 1.8% of the total Fairfield County population, and other figures establish that they constituted, at the relevant time, approximately .93% of the electorate eligible for service on the grand jury.

Fourth, both parties agree as to the accuracy of the numbers and statistics involved in this case. Between 1963 and 1971, 738 grand jurors were chosen from the sheriffs' lists and 41 18-person grand juries were empaneled. Of the 738 grand jurors who were selected during this period only two were Puerto Rican.[4] Thirty-nine grand juries had no Puerto Ricans, and two had one Puerto Rican juror each.

III

While petitioner has no constitutional right to a grand jury array which exactly mirrors the ethnic composition of society, *Swain v. Alabama*, 380 U.S. 202, 208 (1965), the fourteenth amendment does protect him from having the members of his ethnic group substantially underrepresented in the grand jury array. *Castaneda v. Partida*, 430 U.S. 482, 493 (1977). As the Supreme Court has indicated in *Castaneda v. Partida, supra:*

"While the earlier cases involved absolute exclusion of an identifiable group, later cases established the principle that substantial underrepresentation of the group constitutes a constitutional violation as well, if it results from purposeful discrimination."

Id. at 493. *Casteneda* then teaches:

"[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez v. Texas,* 347 U.S., at 478-479. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. *Id.,* at 480. See *Norris v. Alabama,* 294 U.S. 587 (1935). This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. *Hernandez v. Texas,* 347 U.S., at 480. Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. *Washington v. Davis,* 426 U.S., at 241; *Alexander v. Louisiana,* 405 U.S., at 630."

Id., at 494 (footnote omitted).

A.

No dispute is raised as to either the first or third criterion announced in *Castaneda*. As to the first criterion, Puerto Ricans clearly constitute "a recognizable, distinct class" which, as the statistics reveal, has been "singled out for different treatment under the laws,...as applied." The trial court ruling on petitioner's earlier motion to quash the indictment reached this same conclusion, as did the Connecticut Supreme Court.[5] As noted above, the State does not take a contrary position.

With respect to the third criterion, it is also well-established that the procedure used to choose the grand jurors was a "procedure...susceptible of abuse." Fairfield County's procedure afforded its sheriffs even more discretion than did the key-man system in *Castaneda*, which the Supreme Court considered "highly subjective" and "susceptible of abuse as applied." *Id.*, at 497. Moreover, the Second Circuit has had occasion to warn of the danger implicit in the very selection system here under challenge. It noted:

> "Although in this instance there was nothing in the case to show that, in the selection of the grand jury, there was any systematic exclusion of an identifiable group or that the jury list was otherwise not a representative cross-section of the community, the method of selection resting as it does entirely in the hands of one person, the sheriff of the county, leaves much to be desired."

Cobbs v. Robinson, 528 F.2d 1331, 1340 (2d Cir. 1975), *cert. denied*, 424 U.S. 947 (1976) (considering a Fairfield County grand jury). Thus, the only dispute in the case centers on the proper application of *Castaneda's* second criterion.

B.

Under *Castaneda*, the second of the three criteria involves measuring "the degree of underrepresentation" by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time." *Castaneda, supra*, at 494. In order to make out a prima facie case, petitioner must establish not only that his group was underrepresented, but also that the degree of underrepresentation was substantial. *Id., at 493-94.*

The justification for the "substantial" requirement stems from the need to show *intentional* conduct. *Duren v. Missouri*, 439 U.S. 357, 368 n.26. Recent decisions of the Supreme Court have indicated that disparate impact alone will not suffice to establish a violation of the fourteenth amendment.[6] Rather, a party claiming that he has been denied equal protection of the laws must establish that there has been an *intentional* act of discrimination. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra*, at 266. Whether the proof offered is sufficient will necessarily vary on a case-by-case basis. Under some circumstances, statistics alone can establish such a clear pattern of discrimination that they cannot be explained on any legitimate grounds. When this occurs, the statistics may amount to circumstantial evidence sufficient to satisfy the intent requirement. *Id.* at 266.

How clear this pattern must be appears to vary with the nature of the case. In *Arlington Heights*, the court indicated that a pattern of discrimination must generally be quite "stark" in order to justify a finding

of intent. *Id.* at 266. However, as the Court also noted, this requirement is somewhat relaxed in jury selection cases. *Id.* at 266 n.13. In *Castaneda*, supra, a post-*Arlington Heights* jury selection case, the Court concluded that a showing of "substantial" underrepresentation coupled with an opportunity to discriminate was sufficient to satisfy the intent requirement of the fourteenth amendment. *Castaneda*, 430 U.S. at 494-95.

Consequently, the only issue in dispute on this second criterion is whether the statistics, as agreed to by both parties, are sufficient to establish that Puerto Ricans were "substantialy underrepresented" in the grand jury array. Petitioner insists that they are, while the State argues that they are not. In resolving this question it is useful to bear in mind that, in light of the above discussion, "substantial" should be read as "substantial enough to justify an inference of impermissible discriminatory motives."

At its core, the dispute between the parties turns on a difference of opinion over the appropriate way to analyze the statistics. That there should be such a disagreement is not at all surprising given the state of the law on this question. Since courts have begun to consider jury selection cases early in this century they have shown a general trend toward increased sophistication in their use of statistics. Nonetheless, their methodology has varied substantially even within the last decade and a half.

Essentially four different forms of analysis have been used. One of the oldest methods is sometimes called the absolute difference test. D. Baldus & J. Cole, *Statistical Proof of Discrimination*, 145 (1980) (hereinafter Baldus & Cole). This test was exemplified in the case of *Swain v. Alabama*, supra, where the Court found that blacks made up 26% of those eligible for jury duty but composed only 10-15% of the venire. The Court subtracted 10-15% from 26% and concluded that the resulting 11-16%[7] disparity did not amount to substantial underrepresentation.

A second approach, perhaps best characterized as the "ratio" approach, Baldus & Cole at 145, would lead to a very different conclusion under the same facts. This approach focuses on the percentage of eligible jurors who are excluded. Thus, in *Swaim*, where only 10-15% of the eligible 26% were selected for jury panels, there were roughly 50% fewer blacks than would have been statistically expected. Put another way, any eligible white had more than twice as much chance of becoming a juror as did any eligible black. Arguably this amounted to a 50% exclusion of blacks, rather substantial degree of underrepresentation. *See, e.g., Carmical v. Craven*, 457 F.2d 582, 585 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972); *Quadra v. Superior Court of San Francisco*, 403 F. Supp. 486, 495 n.9 (N.D. Cal. 1975). *Cf. Chance v. Board of Examiners*, 458 F.2d 1167, 1171-72 (2d Cir. 1972) (ratio approach applied in challenge to employment test).

The third approach moves away from an examination of percentages and focuses on the differences caused by underrepresentation in each jury. For example, suppose that in *Swain* the entire array consisted of 120 jurors. Suppose also that from this array ten juries of 12 jurors each were selected. If, in fact, the jurors were drawn at random one would expect that 31 black jurors (26% of 120) would be included in the array and approximately three blacks would show up on each jury. In *Swain*, however, the actual pool included only 10-15% black members or, under these assumptions, approximately 16 blacks (13% of 120). Thus, each jury would have had an average of slightly more than one-and-a-half black jurors. Some courts have concentrated on the difference between the three jurors expected on each jury and the one-and-a-half jurors actually present. Often they have reasoned that an underrepresentation of only one-and-a-half blacks out of 12 jurors is minimal and that, therefore, the plaintiff has failed to establish substantial underrepresentation. *See, e.g., United States v. Kleifgen*, 557 F.2d 1293, 1297 (9th Cir. 1977); *United States v. Goff*, 509 F.2d 825, 826-27 (5th Cir.), *cert. denied*, 423 U.S. 827 (1975); *United States v. Jenkins*,

496 F.2d 57, 65 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (construing "substantial" in the context of 28 U.S.C. §1863).

Each of these three tests, however, is inadequate as evidence of intent. Common sense suggests that an absolute percentage difference of 10% can be evidence of intent under some circumstances and not under others. Thus, if the total population consisted of 50 blacks and 50 whites and only ten jurors were chosen, one would expect that the final panel would contain five blacks and five whites. However, if the actual panel contained six blacks and four whites or four blacks and six whites (a 10% absolute difference), one would be unlikely to conclude that this constituted evidence of discrimination. In contrast, assume that a total population contained 10,000 persons, 9,000 of whom were white and 1,000 of whom were black, and that a panel of 1,000 jurors was chosen. If under those circumstances no blacks at all were included in the array, again only a 10% absolute difference, a court could quite reasonably find an intent to discriminate on the basis of race. Similarly, examples which reveal potential errors in the ratio approach can be easily imagined.

Focusing on the number of jurors rather than on percentages does not alleviate the problem either. Where the venire contains numerically fewer black jurors than would statistically be expected, the evidentiary force of the disparity will vary with the total number of black jurors initially expected. Where the number expected is quite small, even slight numerical variations may be more significant than larger disparities would be where blacks are expected in greater numbers.[8] In short, the problem with a test which focuses on the actual number of jurors is that rather than testing for intent it seems to be better designed to test for harm to the defendant. It is designed to show how much difference the underrepresentation will make to the particular complaining defendant rather than to demonstrate and test the intent of the prosecuring State. As *Rose v. Mitchell*, 443 U.S. 545, 551-59 (1979),

makes clear, harm to the particular criminal defendant is not the relevant consideration.[9]

Following *Swain v. Alabama*, the *Harvard Law Review* published an article by Michael O. Finkelstein which, for the first time, developed a rigorous statistical approach to jury selection cases. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966). Finkelstein's suggested approach was first referred to as "interesting" by the Supreme Court in *Whitus v. Georgia*, 385 U.S. 545, 552 n.2 (1967), then expressly "noted" in *Alexander v. Louisiana*, 405 U.S. 625, 630 n.9 (1972), and later fully embraced in *Castaneda*, *supra*, at 496 n.17.[10]

Unlike the three previous tests, Finkelstein's statistical decision theory (SDT) provides a mathematically accurate means of testing the probability that a certain degree of underrepresentation could have been the result of random choice rather than intentional discrimination.[11] Where racial factors have not entered into the selection process, one would expect to discover a random distribution of racial representation. If, based on statistics, it appears unlikely that a particular pattern of racial distribution would have resulted from random choice, it is reasonable to infer that discriminatory racial factors have entered into the selection process. *See Castaneda*, *supra*, at 494 n.13. Unlike the other tests, SDT takes the size of the group into account as one of the factors in the calculations. Thus, the SDT affords a far more accurate measure of intent than do the three other tests discussed above. Accordingly, primary reliance is placed upon it here.

Numerous opinions in which other courts have found no showing of substantial underrepresentation have been brought to the court's attention.[12] As the State indicates in its brief, "Cases such as [these] rely primarily on *Swain v. Alabama*," which, as noted above, applied an "absolute difference" test. Were such a test to be used here, this Court too might be led to reject

petitioner's contentions. The total Puerto Rican population was 1.8% of Fairfield County. Two out of 738 grand jurors were Puerto Rican. This amounts to .3% of the array. The absolute difference of 1.5% (1.8% - .3%) cannot be said to be "substantial," as the Court in *Swain* considered that term. Moreover, the inclusion of even one Puerto Rican grand juror on each of the 39 grand juries previously without Puerto Ricans would grossly *over*represent the actual proportion of Puerto Ricans in the community.

However, if SDT were applied to the facts in this case, even using the premises advanced by the State,[13] it would demonstrate the extreme unlikelihood that this particular distribution of Puerto Ricans could have resulted from racially neutral decisions. The chance of drawing at random no more than two Puerto Ricans in 738 grand juror selections is only 3.28%. The odds of randomly selecting 41 grand juries no more than two of which contained Puerto Ricans is less than four in 100. Viewed from the other side, there was a 96-97% chance that more than two of the 41 grand juries would have had Puerto Rican jurors and that more than two Puerto Ricans would have been selected in 738 selections.

These results are considered by statisticians to be inconsistent with the hypothesis of random selection;[14] if the selection process genuinely had been free from racial considerations, it is extremely likely, even under the State's assumptions, that many more Puerto Ricans would have been selected. Moreover, if any of the initial premises which have been assumed in favor of the State are considered in a light more favorable to the petitioner, the chance that these grand juries were picked without reference to racial factors falls off precipitously.[15]

As noted above, the "substantial underrepresentation" requirement in *Castaneda* is designed to support the inference that the State acted with an intent to discriminate. Since SDT is the best statistical measure of "substantial underrepresentation,"[16] this court finds the

petitioner's analysis persuasive notwithstanding the State's authorities to the contrary. When considered in conjunction with the opportunity for abuse inherent in Fairfield County's discretionary selection system, the application of SDT to these facts raises a rebuttable presumption of intentional discrimination.

Indeed, even if these statistics alone were insufficient to establish a prima facie case, two additional factors militate in favor of such a finding. In his own testimony Sheriff Previdi indicated that he had attempted to match Puerto Rican suspects with grand juries containing Puerto Rican members. This suggests that he was aware of the need to be sensitive to racial factors and of the general lack of Puerto Ricans on his panels. Moreover, Sheriff Previdi also indicated that he chose his juries from among his friends and that he had no Puerto Rican friends. Under the teaching of the plurality opinion in *Cassell v. Texas,* 339 U.S. 282 (1950), this amounts to a virtual confession:

> "Our holding that there was discrimination in the selection of grand jurors in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on this grand-jury list, the commissioners said that they knew none available who qualified; at the same time they said they chose jurymen only from those people with whom they were personally acquainted.... When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial distrimination."

Id. at 287-89 (footnotes omitted). *Cf. Turner v. Fouche,* 396 U.S. 346, 360-61 (1970).

In short, this Court concludes that petitioner has adduced more than enough evidence to establish a prima facie case of purposeful exclusion.

"Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Castaneda*, supra, at 495; *see Rose v. Mitchell*, supra at 565. At best, the State's efforts at rebuttal can be characterized as meager. Sheriff Previdi indicated that on two occasions he had specifically sought out Puerto Ricans for the panel. One such occasion occurred only after the petitioner's motion to quash his indictment was filed and is, therefore, not relevant here. The other time he sought a Puerto Rican, Sheriff Previdi was looking to match a Puerto Rican defendant with a Puerto Rican grand juror. Far from evidence of innocent intent, this act itself constituted a conscious effort to establish a panel based on racial factors, a practice as impermissible as systematic exclusion. *Cassell v. Texas*, supra, at 287 (plurality opinion); *Ross v. Wyrick*, 581 F.2d 172, 175 (8th Cir. 1978); *Harris v. Stephens*, 361 F.2d 888, 891 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967).

The State also points out that Sheriff Previdi asked one of his two Puerto Rican grand jurors to sit "several" times but that the grand juror declined. The record indicates, however, that after these refusals the sheriff did not make any efforts to find more cooperative Puerto Ricans. Citations to *United States ex rel. Chestnut v. Criminal Court of New York*, 442 F.2d 611 (2d Cir.), *cert. denied*, 404 U.S. 856 (1971) and *United States ex rel. Epton v. Nenna*, 318 F. Supp. 899 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir. 1971) are clearly inapposite.

Finally, the sheriff insists that he did not discriminate. While his own declaration is entitled to some weight, a simple protestation that racial considerations played no part in the selection process is not sufficient to rebut a prima facie showing. *Castaneda*, supra, at 498 n.19; *Alexander v. Louisiana*, supra at 632; *Turner v. Fouche*, supra at 361. Thus, the petitioner has established a prima facie case which the State has failed to rebut, and he is therefore entitled to relief.

V.

> "[W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed."

Rose v. Mitchell, supra at 551.

Notwithstanding this recent expression by the Sureme Court, the State still argues that it would be inappropriate to grant petitioner habeas relief. As the State points out, the petitioner cannot show that the unconstitutional indictment caused him any harm since he was subsequently convicted by a petit jury which was free from constitutional defect. This very argument, however, was rejected in *Rose v. Mitchell*, supra. In *Rose*, the Court made it abundantly clear that the injury suffered when an indictment is returned by a racially tainted grand jury is all the injury a petitioner need show in order to quash the indictment and set aside a subsequent conviction. A later finding by a petit jury that a defendant is guilty beyond a reasonable doubt will not render a prior improper indictment harmless error.[17]

The State argues that *Rose v. Mitchell* is distinguishable because Fairfield County has already changed its system for selecting grand juries. Here, unlike *Rose*, there is an affidavit from the sheriff indicating that the old, unfettered-discretion system has been replaced by a new system designed to insure random selection. Thus, the State concludes that there is no need to grant habeas relief in order to deter future constitutional violations by the county.[18]

The State's argument appears to be predicated on the assumption that the underlying justification for the result in *Rose v. Mitchell* was the concept of deterrence.

A careful reading of the opinion, however, does not support that conclusion. The Court in *Rose* was concerned with the "appearance of justice" and the "integrity of the judicial process." *Id.* at 555-56. To allow the petitioner to remain incarcerated where the trial itself was set in motion by a body tainted with racial bias would be to condone such behavior and implicitly to wink at "odious" and "pernicious" racial discrimination. *Id.* at 555. It is because racial discrimination in the selection of a jury "strikes at the fundamental value of our judicial system and our society as a whole" that it is inappropriate to treat it as harmless error after a valid conviction. *Id.* at 556.[19]

VI.

Since petitioner was indicted by a grand jury in which Puerto Ricans were substantially underrepresented, he is entitled to be released unless a new indictment is returned and petitioner is retried within 90 days.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of July, 1980.

/s/ M. Joseph Blumenfeld
Senior United States District Judge

FOOTNOTES

1. In addition to the equal protection claim which is discussed at length below, petitioner also presents claims under the search-and-seizure clause of the fourth amendment and the due process clause of the fourteenth amendment. In light of this Court's disposition of the equal protection claim, petitioner's other contentions may be left for another day. If, in fact, the State undertakes to reindict and retry the petitioner, these same contentions may not be presented at all or, if so, they may be presented in a different framework.

2. While the record does not contain a written stipulation both parties have indicated that the findings of the trial court can be considered as established for purposes of this ruling. Apart from the affidavit of Alan Gelfand, petitioner's statistician, and the affidavit of C. Young Becker, Deputy Sheriff of Fairfield County, no additional facts have been brought to the court's attention. Under 28 U.S.C. §2254(d) the state court findings are presumptively correct. Tanner v. Vincent, 541 F.2d 932, 937 (2d Cir. 1976), *cert. denied*, 429 U.S. 1065 (1977). Where, as here, they go essentially unchallenged (*see* note 4 *infra*) they are binding on the court.

3. In addition to the statistics set forth in the text, several other factors have been presented which tend to show that Puerto Ricans are an identifiable class in Fairfield County. For example, at least one Fairfield radio station broadcasts in Spanish, several organizations in the area have developed programs expressly designed to meet the needs of Puerto Ricans and special language programs to assist Spanish-speaking children have also been instituted in some public schools.

4. The State does point out that three additional names on the sheriff's list, Douglas Bora, Amadeo Morello and Ferdinand Equi, could be Puerto Rican. However, Judge Saden, the State trial judge, did not include these individuals as Puerto Ricans, and Sheriff Previdi indicated that he believed that he had only selected two persons of Puerto Rican extraction during his tenure in office. In other words, Sheriff Previdi himself did not consider these three individuals to be Puerto Rican. The State has had the sheriff's list which includes these names and presumably a means of contacting these individuals for the nine years since petitioner first filed his motion to quash the indictment. If any of these individuals were Puerto Rican the State has had substantial opportunity to present affidavits or other evidence to that effect.

5. State v. Villafane, 164 Conn. 637, 645-46 (1973).

6. A challenge to the composition of state grand juries, unlike a challenge to the petit jury, involves only the fourteenth amendment equal protection clause. No fifth or sixth amendment due process considerations are invoked. Castaneda v. Partida, 430 U.S. at 509-10 (Powell,J., dissenting); Alexander v. Louisiana, 405 U.S. at 633; Boothe v. Wyrick, 452 F. Supp. 1304, 1310 (W.D. Mo. 1978). Analysis of equal protection jury claims differs somewhat from fifth and sixth amendment challenges to the jury in that the latter does not require a showing of intent. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

7. In *Swain*, the Court, in fact, subtracted 10-15% from 26% and referred to the resulting difference as 10%. Swain v. Alabama, 380 U.S. at 205, 209. *See* United States ex rel. Barksdale v. Blackburn, 610 F.2d 253, 264 n.14 (5th Cir. 1980).

8. Thus, for instance, if an array contained 1,000 members drawn from a population 30% of which was black, one would expect 300 black jurors. If 290 black jurors were actually found in the array this would amount to an underrepresentation of only ten jurors. Compared to a situation where only 15 black jurors are statistically expected and only five are found (still an underrepresentation of only ten jurors) the former is far less evidence of intent since it is far more likely to have happened by chance rather than by design.

9. Two Second Circuit cases appear to have concluded that challenges to a jury panel should be tested by considering "the numerical effect upon the composition of the jury panel rather than the percentage effect...." Anderson v. Casscles, 531 F.2d 682, 685 n.1 (2d Cir. 1976). *See also* United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). In both cases, it appears that the record before the Court of Appeals included statistical evidence computed pursuant to the Statistical Decision Theory (see discussion in text *infra*), which established that the minority group's underrepresentation was unlikely to have resulted from random selections. This evidence was not considered important, however. "[W]hether the difference is statistically significant is not dispositive of its constitutional significance." Anderson v. Casscles, supra, at 685 n.1.

The continuing vitality of *Jenkins* and *Anderson* might well be called into question by the Supreme Court's ruling in Castaneda v. Partida, 430 U.S. 482 (1977). *See* note 16 *infra*. The Second Circuit has apparently not considered these statistical questions in a jury selection context in light of that ruling. More importantly, neither *Jenkins* nor *Anderson* considered an equal protection challenge such as is raised in this case. *Jenkins* construed the word "substantial" in a House Report to 28 U.S.C. §1861 *et seq.* (the Jury Selection and Service Act). *Anderson* ruled on a defendant's claim that he had been denied a petit jury panel which fairly represented a cross-section of

the community in violation of the sixth amendment. Neither a statutory claim under the Jury Selection Act nor a constitutional sixth amendment claim raises questions of the intent of the party selecting the jury. *See* note 6 supra. Rather they focus on the harm to the defendant seeking relief. As noted in the text, it may well be that harm to the defendant is best measured by focusing on the actual racial composition of the jury he faced.

In this case, however, statistics are being used to establish a prima facie case of interest. As noted in the text *infra*, Statistical Decision Theory is a better measure of intent. Thus, I do not consider this circuit's reluctance to apply Statistical Decision Theory in those two cases as controlling here.

10. The same statistical decision theory has also been applied outside of the jury selection context. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09, 311 nn. 14 and 17 (1977) (public employment disparate treatment case); Board of Education of City School Dist. of New York v. Califano, 584 F.2d 576, 584 n.29 (2d Cir. 1978). *aff'd*, 48 U.S.L.W. 4035 (Nov. 28, 1979).

11. The development of the mathematical formula is clearly set forth and discussed at length in Finkelstein's article. It may be useful, however, to set forth an abbreviated example of its application.

Suppose that one wanted to find out what the chances were of randomly selecting no more than two Puerto Rican jurors when ten jurors are selected from a large population which is 40% Puerto Rican and 60% non-Puerto Rican. If P is the probability of selecting a Puerto Rican juror on any draw, P=.4 or 40%. Q, the probability of selecting a non-Puerto Rican, is .6 or 60%.

The probability of selecting two Puerto Ricans in the first two draws is P (for the first draw) xP (for the second draw) or PxP or P^2 or $(.4)^2$ or .16. The chance of selecting non-Puerto Rican jurors on the next eight draws is QxQxQxQxQxQxQxQ or Q^8 or $(.6)^8$ or .0168. So, the total chance of selecting first two Puerto Rican jurors and then eight non-Puerto Ricans is P^2 x Q^8 or .16 x .0168 or .00269.

This last figure represents the chance that exactly two out of the ten jurors drawn will be Puerto Rican and that the two Puerto Ricans will be drawn first. Of course, in jury selection cases, the order of selection is irrelevant so this figure needs to be multiplied by the possible number of different arrangements of two Puerto Ricans and eight non-Puerto Ricans.

Statisticians have developed the following formula for computing this number of different possible arrangements. *See* Finkelstein, *The*

Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338, 355 n.60 (1966).

> Where "n" is the number of total jurors selected, "v" is the number of Puerto Ricans chosen, and "y" is the number of non-Puerto Ricans chosen, the total possible number of combinations is as follows:

$$\frac{(n) \times (n-1) \times (n-2) \ldots \times (1)}{[(v) \times (v-1) \ldots \times (1)][(y) \times (y-1) \ldots \times \times (1)]}$$

When the numbers used in the above illustration are inserted one gets:

$$\frac{10 \times 9 \times 8 \times 7 \ldots \times 1}{[2 \times 1][8 \times 7 \times \ldots \times 1]}$$

or 10x9/2x1 or 90/2 or 45. Thus, 45 (the number of possible combinations) x .00269 (the chance of any one combination occurring) yields .121 (the chance of selecting exactly two Puerto Ricans out of ten draws in any order).

This, however, is still not sufficient. Ultimately what one is interested in discovering is the chance that two *or less* Puerto Ricans would be drawn at random. To arrive at this number, one simply adds the chance of selecting exactly two Puerto Ricans to the chance of selecting exactly one Puerto Rican and the chance of selecting no Puerto Ricans at all. This, in turn, requires that the above analysis be repeated using v=1 (one Puerto Rican selected) and v=0 (no Puerto Ricans selected). When this is done the following numbers result:

> The chance of selecting one Puerto Rican and nine non-Puerto Rican jurors in any order is .040.
>
> The chance of selecting no Puerto Rican jurors is .006.

Therefore the total chance of selecting two or less Puerto Ricans in any order is:

$$.121\ (v=2) + .040\ (v=1) + .006\ (v=0) = .167\ (v=2)$$

A court will only draw an inference of intentional discrimination where it appears unlikely that the particular distribution of jurors could have resulted from random selections. In this example there would be a 16.7% chance of randomly selecting a jury with two or less Puerto Ricans. A 16.7% chance of picking such a jury at random indicates that it is so likely that random selection accounted for the

composition of the jury that the court could not reasonably infer that racial factors entered into the selection process. *See* note 14 *infra*. Hence, in this hypothetical example, the defendant would not have established a statistical prima facie showing of discriminatory purpose.

(Of course, this example was chosen merely to illustrate the application of SDT to a simplified fact situation; the numbers used and the ultimate conclusions drawn bear no relationship to the actual facts in this case.)

12. *E.g.*, United States v. Kleifgen, 557 F.2d 1293 (9th Cir. 1977); United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Goff, 509 F.2d 825 (5th Cir.), *cert. denied*, 423 U.S. 827 (1975); United States v. Whitley, 491 F.2d 1248 (8th Cir.), *cert. denied*, 416 U.S. 990 (1974).

13. There are three sets of assumptions which will affect the appropriate application of statistics. First, since the sheriff only chose the grand jurors from a limited number of cities in Fairfield County rather than from the county as a whole, petitioner argues that the Puerto Rican population percentage to be used in applying SDT should be adjusted upward to reflect the greater proportion of Puerto Ricans living in those cities. The State argues that the county-wide figure is more appropriate.

Second, petitioner, relying on Castaneda v. Partida, 430 U.S. 482 (1977), argues that the appropriate Puerto Rican population figure against which to compare the grand jury selections is the percentage of Puerto Ricans in the population without regard to their eligibility to serve as grand jurors under Connecticut law. The State argues that since intent is the relevant issue the appropriate comparison is only between the percentage of Puerto Ricans actually selected and the percentage eligible.

Finally, petitioner contends that since deliberate inclusion of Puerto Ricans also violates the fourteenth amendment the two Puerto Rican selections by Sheriff Previdi should not be considered. Thus, instead of asking about the likelihood of selecting two Puerto Ricans out of 738 choices, petitioner urges the court to question the likelihood of selecting no Puerto Ricans from 736 selections. The State presumably opposes this suggestion.

Because it is not significant to the result this Court reaches, these several disputes need not be resolved. For the purposes of analysis, the State may be assumed to have prevailed on all points. Thus, the figures in the text compare two Puerto Ricans in 738 selections with the proportion of eligible Puerto Ricans in the pool of those eligible for grand jury service everywhere in Fairfield County.

14. Where the statistical chance of random occurrence falls below 5% most statisticians are willing to reject the hypothesis of random selection. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338, 359 (1966). *See also* Baldus & Cole, supra, at 291 and Affidavit of Alan Gelfand ¶10. In Hazelwood School Dist. v. United States, 433 U.S 299, 309 n.14 (1977), the Supreme Court noted "'[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations' then the hypothesis that [the selection was made] without regard to race would be suspect. *Castaneda,* 430 U.S. at 497 n.17." For normal bell-shaped distribution curves involving a large number of selections such as would be expected here, anything less than 5% would be more than two standard deviations from the expected value. Baldus & Cole, supra, at 297.

15. For instance, the chance of obtaining two or less Puerto Ricans in 738 selections drawn at random from the entire population of Fairfield County is .00017 or .017%. Similarly, the chance of obtaining no Puerto Ricans in 736 random selections from all of Fairfield County is .000002 or .0002%.

16. In *Castaneda* itself, the statistical disparity was examined via SDT. The Connecticut Supreme Court has also concluded that use of SDT is appropriate where the "group claimed to be victimized makes up a relatively small percentage of the total electorate...." State v. Villafane, 164 Conn. 637, 648 (1973).

17. A grand jury does not determine ultimate questions of guilt and innocence; rather, its role is to determine whether there is probable cause to believe the charges against the defendant and to require him to stand trial. Branzburg v. Hayes, 408 U.S. 665, 686, (1972); State v. Stepney, 41 Conn. L.J. No. 52 at 1 (June 24, 1980). Because of this distinction between grand and petit juries many practices impermissible at trial are acceptable before the grand jury. *See, e.g.,* United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion) (no constitutional right to attorney before grand jury); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (exclusionary rule is inapplicable to grand jury proceedings); Costello v. United States, 350 U.S. 359 (1956) (hearsay evidence can support grand jury indictment); *see also* State v. Stepney, supra, and cases cited therein.

Notwithstanding, the Supreme Court held in Rose v. Mitchell that the right to be prosecuted free from impermissible discrimination in all respects is so central to the judicial process that strict rules must be applied in both the grand and petit jury context.

18. Even if this Court were inclined to limit the holding in *Rose* to a deterrence rationale, this case would be a dubious point from

whence to embark on such a course. Here the affidavit of the Deputy Sheriff for Fairfield County, C. Young Becker, indicates that the selection system now used insures a random selection. However, the change in the selection system has not been codified and appears to be merely a matter of unwritten internal policy. Apparently no official act or regulation would prevent a new sheriff or even this same sheriff from choosing to revert to the prior practice.

Moreover, the criminal prosecution was brought in the name of the State of Connecticut. Becker only attests to a change in Fairfield County's system. Petitioner's brief indicates, and the State does not challenge, that other major Connecticut counties still give their sheriffs unfettered discretion in selecting grand jurors. Thus, Connecticut, as the prosecutor, may still benefit from the reminder that racially biased selections for grand juries cannot be tolerated.

19. Furthermore, the court noted that reversal is less costly than enforcement of the fourth and fifth amendments' exclusionary rule, because it does not preclude reindictment and retrial on the same charges. *Rose* at 557-58. Similarly, the Court indicated that "the strong interest in making available federal habeas corpus relief outweighs the costs associated with such relief." *Id.* at 564.